

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ATLANTA BRANCH OFFICE
DIVISION OF JUDGES

P. J. ROSALY ENTERPRISES, INC.
d/b/a ISLANDWIDE EXPRESS
Employer

and

CASE 24–RC–8452

UNION DE TRONQUISTAS DE
PUERTO RICO, LOCAL 901,
IBT, AFL-CIO
Petitioner

Jose I. Ortiz, Esq., Counsel for the
Regional Office.

Jose Gonzalez-Nogueras, Esq., and
Kayra D. Montanez Laboy, Esq.,
for the Employer.

Jorge Farinacci, Esq., for the Petitioner.

DECISION AND RECOMMENDATION
ON OBJECTIONS

Statement of the Case

WILLIAM N. CATES, Administrative Law Judge: I heard this case in San Juan, Puerto Rico on August 31, and September 1, 2005.¹ The hearing was held pursuant to the Supplemental Decision on Objections issued by the Board’s Regional Director on July 22.

Union de Tronquistas de Puerto Rico, Local 901, IBT, AFL–CIO (“the Petitioner” or “the Union”), filed a petition on March 16 seeking to represent certain employees of P.J. Rosaly Enterprises, Inc., d/b/a Islandwide Express (“the Employer”). The Employer and Petitioner entered into a Stipulated Election Agreement (“Agreement”), which Agreement was approved by the Board’s Acting Regional Director on March 31, providing that an

¹ All dates are in 2005 unless otherwise indicated.

election would be conducted by secret ballot on April 26. The appropriate collective–bargaining unit, as set forth in the Agreement, is as follows:

5 All regular full time and part–time delivery drivers, shipping, receiving,
warehouse employees and warehouse clerks and cashiers employed by
the Employer at its facilities in Arecibo, Mayaguez, Ponce, Carolina,
Caguas, and Puerto Nuevo, Puerto Rico but excluding all other
employees, temporary employees, office clerical, guards, professional
10 employees, confidential employees and supervisors as defined by the
Act.²

The Tally of Ballots, copies of which were prepared and made available to the parties, shows the following results for the April 26 election:

15 Approximate number of eligible voters..... 167
Number of Void ballots..... 2
Number of Votes cast for Petitioner..... 95
20 Number of Votes cast against participating labor organization(s)..... 50
Number of Valid votes counted..... 145
Number of Challenged ballots..... 21
Number of Valid votes counted plus challenged ballots..... 166

25 Challenges are not sufficient in number to affect the results of the election.

On May 3, the Employer filed timely Objections to the election which were served upon the Petitioner on the same date. Pursuant to the Stipulated Election Agreement, and in conformity with Section 102.69 of the Board’s Rules and Regulations, on May 12, 2005 the
30 Regional Director for Region 24 of the Board issued a Report and Recommendation on Objections recommending that the Employer’s objections be overruled in their entirety due to the Employer’s failure to timely submit evidence in support of its objections. On May 19, the Employer filed exceptions to the Report and on June 22, the Board issued a Decision and
35 Order remanding the case to the Regional Director with directions to accept the Employer’s evidence in support of its objections, to investigate the Employer’s 11 numbered objections, and to issue a Supplemental Decision.

40 The Regional Director concluded that certain of the Employer’s Objections raise substantial and material factual issues which may best be resolved by hearing.³ The Regional Director’s Supplemental Decision on Objections and Notice of Hearing concluded by ordering that a Report be prepared and served upon the parties and the Board containing resolutions of the credibility of witnesses, findings of fact and recommendations to the Board

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² Throughout this decision, the above shall be referred to as the Unit.

³ The Regional Director recommended that Objection No. 3, insofar as it refers to photographing of supervisor’s homes, and Objections Nos. 4, 5 and 11 be overruled. No exceptions have been filed to this portion of the Regional Director’s Supplemental Decision.

as to the disposition of said issues.

The Objections that remained for resolution at the hearing are as follows:

- 5 1. The Union de Tronquistas de Puerto Rico, Local 901, IBT, AFL-
CIO (hereinafter the “Union”) interfered with, intimidated,
threatened, coerced and restrained employees in the exercise of
their Section 7 rights, and has interfered with their ability to
10 exercise a free and reasoned choice in the election by
photographing and/or videotaping individuals who refused to
accept the Union’s propaganda.
- 15 2. The Union interfered with, intimidated, threatened, coerced and
restrained employees in the exercise of their Section 7 rights, and
has interfered with their ability to exercise a free and reasoned
choice in the election by making threatening phone calls to
employees.
- 20 3. The Union interfered with, intimidated, threatened, coerced and
restrained employees in the exercise of their Section 7 rights, and
has interfered with their ability to exercise a free and reasoned
choice in the election by photographing and/or videotaping
25 employees’ homes.
- 30 6. The Union interfered with, intimidated, threatened, coerced and
restrained employees in the exercise of their Section 7 rights, and
has interfered with their ability to exercise a free and reasoned
choice in the election by standing outside the room where
Islandwide Express’ Final Campaign Group Talk was being held in
order to stare at employees who came in or out of Islandwide
Express’ Final Campaign Group Talk.
- 35 7. The Union interfered with, intimidated, threatened, coerced and
restrained employees in the exercise of their Section 7 rights, and
has interfered with their ability to exercise a free and reasoned
choice in the election by punching and hitting the buses
40 transporting the employees to and/or from the Islandwide Express’
Final Campaign Group Talk.
- 45 8. The Union interfered with, intimidated, threatened, coerced and
restrained employees in the exercise of their Section 7 rights, and
has interfered with their ability to exercise a free and reasoned
choice in the election by pointing in an aggressive manner at the
employees inside the buses transporting the employees to and/or
50 from the Islandwide Express’ Final Campaign Group Talk.

9. The Union interfered with, intimidated, threatened, coerced and restrained employees in the exercise of their Section 7 rights, and has interfered with their ability to exercise a free and reasoned choice in the election by shouting intimidating words at the employees inside the buses transporting the employees to and/or from the Islandwide Express' Final Campaign Group Talk.

10. The Union interfered with, intimidated, threatened, coerced and restrained employees in the exercise of their Section 7 rights, and has interfered with their ability to exercise a free and reasoned choice in the election by photographing employees as they came in and/or out of Islandwide Express' Final Campaign Group Talk.

On the entire record, including my observation of the demeanor of the witnesses,⁴ and after considering the arguments made by the Employer in its brief, I make the following findings and conclusions.

Objection No. 1

The employer offered the testimony of two witnesses to establish that the Union photographed or videotaped individuals who refused to accept the Union's propaganda.

Virginia Cintron is a unit employee who has worked as a messenger at the Puerto Nuevo facility for about 8 years. She testified that, on April 15, as she was entering the Employer's facility in her vehicle, she observed two young women and a van identified as belonging to the Union parked next to the entrance. One of the women tried to hand her a leaflet. When Cintron refused to take the leaflet, she observed a man walk up to the passenger side of her vehicle with what appeared to be a camera and either take her picture or "seem to take" her picture. Cintron did not know or recognize any of these people but testified that she believed they were from the Union because she saw the Union's logo.⁵ According to Cintron, when she saw the man take her picture, she rolled down the window and asked the woman with the leaflet why the man was photographing her. The man came around the front of her vehicle and answered by saying, "this is to identify them."⁶ Cintron testified further that she felt threatened by this conduct and that she discussed the incident with one co-worker, a relatively new employee whose name she did not know. According to Cintron, this incident occurred the day after she received the allegedly threatening phone call referred to in Objection No. 2.

⁴ All of the witnesses testified through an interpreter.

⁵ Cintron did not specify whether she saw the logo on their clothing or on the vehicle.

⁶ After providing this answer, the interpreter interjected a point of clarification, advising the court that the witness had used the plural form of "you" in Spanish. Nevertheless, the translation of Cintron's answer in the record is "them".

Oscar Ortiz Maldonado, who is an independent trucker not employed in the Unit, testified that he was approached by two young women on April 12 as he was standing on the terminal ramp at the Mayaguez terminal. According to Ortiz, the women tried to hand him some papers. When he refused, one of the women who had a camera started to videotape him. Soon thereafter, the Employer's security guards came and escorted them out. Ortiz testified that he believed they were from the Union because they got out of the van that played music (referred to in the record as the "tumba coco") and which had the Union's logo on it. Ortiz further testified that two employees, Pablo Vega and Hector were nearby and asked him what happened. Ortiz told them what happened. Ortiz admitted that the women did not threaten him and that he had no other problems with the Union during the campaign.

Luz Delia Perez, the Union's organizer, testified for the Petitioner and acknowledged that she visited the Employer's terminals in a van to distribute literature. She was usually accompanied by Pedro Gonzalez, who was hired by the Union to work on the campaign, and occasionally by a young female college student doing an internship with the Union.⁷ She did not specifically deny that the Union photographed or videotaped individuals who declined to take union literature.

In *Randell Warehouse of Arizona*, 328 NLRB 1034 (1999), the Board, overruling precedent,⁸ held that a union's conduct of photographing employees during the distribution of union literature outside an employer's premises, absent evidence of any express or implied threats or of other coercion, is not objectionable. The Board further found it unnecessary to examine the adequacy of the union's explanation for such conduct. Although the Court of Appeals, in a related case challenging the Board's certification of the union in *Randell Warehouse*, supra,⁹ remanded the issue to the Board for further consideration of its decision in light of other precedent, the Board has never overruled or departed from this holding in the context of objections. Another Court of Appeals has approved of the Board's holding. See *Overnite Transportation v. NLRB*, 294 F.3d 615, 623 (4th Cir. 2002). See also *Kmart Corp.*, 322 NLRB 1014 (1997), enf'd. 125 F.3d 572 (7th Cir. 1997). The Board has been more inclined to find such photographing to be unlawful when it occurs in the context of a picket line. See *Teamsters Local 890 (Basic Vegetable Products, L.P.)*, 335 NLRB 686 (2001) and cases cited therein. Even in that context, however, the Board considers all the circumstances of a case before determining whether the photographing of employees crossing a picket line violates Section 8(b)(1)(A). In short, there is no *per se* rule that such conduct is either objectionable or unlawful.

The Employer here argues that the Union's photographing, or apparent photographing, of Cintron, warrants setting aside the election because of the statement of the man with the camera, that the Union wanted to "identify them [or you plural]." In the Employer's view of

⁷ Although Perez was present throughout the hearing, neither Cintron nor Ortiz identified her as one of the women who were involved in these two incidents. Ortiz in fact denied that Perez was there.

⁸ *Pepsi-Cola Bottling Co.*, 289 NLRB 736 (1988). Cf. *Mike Yurosek & Son, Inc.*, 292 NLRB 1074 (1989) which the Board re-affirmed in *Randell Warehouse*.

⁹ *NLRB v. Randell Warehouse of Arizona*, 252 F.3d 445 (D.C. Cir. 2001).

the facts, this statement, in the context of the allegedly threatening phone call Cintron received the night before and the other allegedly objectionable conduct cited by the Employer, “could reasonably put employees in fear that the pictures would be used for future reprisals.” *Mike Yurosek & Sons*, supra, at 1074, fn. 5. The problem with the Employer’s argument is that there is no evidence that the Union was responsible for the threatening phone call that Cintron received. The statement by the gentleman with the camera, even assuming he was an agent of the Union, is ambiguous. The Union may have been photographing employees for purposes of identifying them as part of its organizational efforts, a purpose recognized by the Board as legitimate. *Randell Warehouse*, 328 NLRB, supra, at 1036. The statement here is clearly different from that of the union agent in *Mike Yurosek*, supra, i.e., “we’ve got it on film; we know who you guys are ... after the Union wins the election some of you may not be here.” The other conduct engaged in by the Union here, as will be explained later, was not sufficiently intimidating or coercive to render this one incident objectionable. In any event, Cintron could recall telling only one employee about this incident. Without evidence of wider dissemination among unit employees, it cannot be said that the Union’s conduct toward Cintron affected the results of this election, where the tally showed that an overwhelming majority of unit employees voted in favor of representation. See *Cornell Forge Co.*, 339 NLRB 733, 734 (2003); *Associated Rubber Co.*, 332 NLRB 1588 (2000).

Because Ortiz was not employed in the Unit at the time of this incident, any conduct directed toward him could not have affected the results of the election. In any event, the videotaping of Ortiz was unaccompanied by any statements or other conduct that would reasonably lead an employee to believe that the Union might use the images captured for future reprisals. Although Ortiz testified that two employees were nearby and witnessed this incident, no employee witnesses were called by the Employer to corroborate Ortiz’ testimony. Even assuming he told the two employees that the Union videotaped him, such conduct, without more, is not objectionable. *Randell Warehouse*, supra; *Kmart Corp.*, supra.

Accordingly, I shall recommend that the Employer’s Objection No. 1 be overruled.

Objection No. 2

The Employer offered the testimony of two employees in support of this objection, alleging that the Union made threatening phone calls to employees.

Cintron also testified regarding this objection. She testified that, during a meeting held by the company on April 14 at the Puerto Nuevo terminal, the employer showed a film about a fire that occurred in 1986 at the DuPont Plaza Hotel in San Juan during a labor dispute. The Petitioner was the Union involved in that dispute. According to Cintron, she spoke up at the meeting to express her belief that unions sometimes create situations among workers that could lead to violence that might be avoided through dialogue with the Employer. Cintron testified further that, at about 8-8:30 that evening, she received a telephone call at her home from a restricted number. When she answered the phone, a voice she did not recognize responded by saying, “Hello, President. Even though this – even though there are thieves and dirty, and I don’t remember what other word though, those thieves and

mafiosos and I don't know what, they said that you're going to be one of the first to be out." Before she could say anything, the call ended. Cintron described the caller as having a young voice but acknowledged that she did not know who called her. As noted above, the day after receiving this call, Cintron claims to have been photographed when she refused to accept union literature. According to Cintron, she mentioned having received this call to other co-workers. She testified that she received three other phone calls in which whoever was on the other end of the line said nothing. As with the first call, her caller identification did not reveal the phone number of the caller.

The Employer also called Ramon Santiago as a witness in support of this allegation. Santiago, who has been employed by the Employer for two years, testified that he received a phone call early in the campaign from Angel Martinez, another employee who later served as one of the Union's observers at the election. Santiago could not recall the date of this call. According to Santiago, Martinez encouraged, or requested, him to support the Union by signing a card. He recalled that Martinez spoke in a normal tone of voice. Although Martinez did not say anything else, Santiago claimed to have felt "pressured." He acknowledged that he is a nervous person. Santiago told no one else about the phone call.

The testimony of Santiago is insufficient to support the objection. Santiago conceded no threat was made. His complaint, if there is one, is that he felt "pressured" to support the Union. It is well-settled that an employee's subjective reaction to Union conduct is irrelevant to the question of whether there was objectionable conduct warranting a new election. The test is an objective one, i.e. whether the words or action would reasonably tend to threaten or coerce an employee in making a free choice in the election. *Corner Furniture Discount Center, Inc.*, 339 NLRB 1122, 1123 (2003); *Avis Rent-a-Car System, Inc.*, 280 NLRB 580 (1986). Here, even assuming it could be shown that Martinez was an agent of the Union in making this call to Santiago, there is nothing that was said in that conversation that would lead an employee to reasonably believe he would suffer adverse consequences by not supporting the Union.

The evidence regarding the anonymous call received by Cintron is also not sufficient to sustain the objection. There is no proof in the record that an agent of the Union, or even another employee who supported the Union, made this call. In addition, the "threat" is ambiguous. The caller made no reference to the Union or to the organizing campaign. In fact, the conversation, as described by Cintron, makes very little sense. This could be the result of problems in translating from the Spanish to English, or it could be due to faulty recollection on the part of the witness. In any event, I find that the Employer has not met his burden of proving that the Union made threatening phone calls to any employees. Cf. *Cedars-Sinai Medical Center*, 342 NLRB No. 58 (July 28, 2004) where the Board found "anonymous" threatening phone calls objectionable based on the administrative law judge's finding that the Union was responsible for making these calls.

I have also evaluated this allegation under the standard applied by the Board to third-party conduct, i.e. threats or actions of employees and other individuals who are agents of neither the Union nor the Employer. Under that standard, an election may be set aside if the

objecting party establishes that third-party conduct during the election campaign was so aggravated as to create a general atmosphere of fear and reprisal rendering a fair election impossible. *Cal-West Periodicals, Inc.*, 330 NLRB 599, 560 (2000) and cases cited therein. In assessing the seriousness of third-party threats, the Board considers the nature of the threat; whether the threat encompassed the entire unit; whether reports of the threat were widely disseminated within the unit; whether the person making the threat was capable of carrying it out and whether it is likely employees acted in fear of this capability of carrying out the threat; and whether the threat was “rejuvenated” at or near the time of the election. *Accubuilt, Inc.*, 340 NLRB No. 161 (December 31, 2003); *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). The anonymous call received by Cintron, even if it contained a threat, did not meet this standard.

Accordingly, I shall recommend that the Employer’s Objection No. 2 be overruled.

Objection No. 3

As noted above, the Regional Director has already overruled that portion of this objection that alleged that the Union photographed supervisors’ homes. The Employer offered no evidence in support of the remaining allegation, that the Union photographed employees’ homes. Accordingly, I shall recommend that the Employer’s Objection No. 3 be overruled in its entirety.

Objections Nos. 6-10

All of the remaining objections involve Union conduct that allegedly occurred on April 23 at the Marriott Courtyard Hotel in Isla Verde, Puerto Rico, where the Employer was holding its final campaign meeting with employees before the election.

Sara Molina, the Employer’s Human Resources Director at the time, made all the arrangements for this meeting. She testified that, although employees were advised of the meeting by letter and were required to attend, they were not told where the meeting would be held. Employees were transported to the meeting from all of the Employer’s terminals by bus, one for each terminal. Employees were not told where they were going when they got on the bus. At the hotel, the employees were given vouchers for lunch in the hotel restaurant. After lunch, many of the employees went out to a terrace area by the beach until the meeting started. According to Molina, 98 of the Employers 166 employees attended this meeting.

Molina testified that, while talking to some of the employees on the terrace before the meeting, she observed about 6 people, including men, women and children, standing under a palm tree on the beach. One of the men, who had a beard, was carrying a loudspeaker. She did not recognize any of them. Although Molina observed that they were wearing dark shirts with yellow lettering, she was unable to read what it said. According to Molina, the group under the palm tree remained there and did not approach any employees and did not do or say anything, during the time she was on the terrace.

Molina testified further that, when it was time for the Employer's meeting to start, she gathered up the employees and directed them to a meeting room off a hallway that runs from the main entrance of the hotel to a set of doors leading to the terrace and the beach. The restaurant is across the hall from the meeting room. During the meeting, Molina left the room and stood in the hallway with another of the Respondent's management officials. According to Molina, more people had joined the group under the palm tree. She observed police on a sand bike approach the group, talk to them and leave. Later, according to Molina, another group of uniformed officers walked past her down the hallway and out the doors to the beach. These police stood outside the door talking to the hotel's security director before they left. Molina did not see these police officers speak to the group on the beach. The hotel's security director then approached her and the Employer's Security Director and asked to meet with them. Molina and the two security directors then met with the hotel's manager. According to Molina, the hotel manager told her that they had information that the Teamsters were there, that "tourists" were uncomfortable with the police activity, and that the Employer had to end its activity there as soon as possible and leave the hotel. Molina returned to the meeting room, told the Employer's president, Mr. Rosaly, what she had just been told and then called for the busses to return to the hotel to pick up the employees. The employer ended the meeting by 4:30, within about a half hour of Molina's meeting with the hotel manager. While all of this was going on, the Employer conducted its meeting without interruption, out of sight of the people on the beach and the "police activity" described by Molina. Moreover, when employees asked what was going on, after Molina had interrupted the meeting, they were told by the Employer's officials that everything was okay.

Molina testified further that, when the busses arrived, the employees were escorted in groups, one terminal at a time, to a side entrance of the hotel where the busses were waiting. Molina testified that, at one point, as she was returning to the meeting room after escorting a group to the busses, she saw Perez, the Union's organizer, standing in the lobby with two men. She observed that Perez was talking on a cell-phone. Molina admitted that Perez said nothing and did not interfere with the employees as they went from the meeting room to the busses. Molina also admitted that at no time did she see any of the individuals who were believed to be from the Union interfering with the employees or the meeting.

In addition to Molina, the Employer called 8 employees who attended the meeting, i.e. Wilfredo Nieves, Jose Ortiz and Cintron, all from the Puerto Nuevo terminal, Yolanda Correa from the Arecibo terminal, Enrique Morell from the Ponce terminal, Jose Alicea and Jose Manuel Padilla from the Carolina terminal and Herbert Figueroa from the Caguas terminal. All were transported to and from the hotel in the busses provided by the Employer. These employees generally corroborated Molina's testimony as to the period preceding the start of the meeting. Those who were on the terrace before the meeting also observed a group of people standing under the palm tree on the beach. However, their recollection of the number of people in this group varied from as few as 2 to as many as six. Not all recalled seeing children in the group. Several of the employees who testified identified this group as being associated with the Union because they saw individuals in the group wearing shirts with the Union's logo. Cintron testified that she also recognized the individuals as the same people who had handbilled for the Union outside the Employer's terminal. She recognized one of the

men as the man who took her picture on April 15 when she declined a leaflet.¹⁰

All of the witnesses agree that no one from the group on the beach approached any of the employees on the terrace or said anything to them while they were there.¹¹ Although
 5 Correa claimed that the people on the beach looked at the employees “with an attitude”, she conceded it was not an attitude of aggression. Similarly, Alicea claimed the group was standing in a “militant” posture, but he did not describe what it was about their posture that led him to this belief.

10 Nieves is the only witness to testify that individuals in the group on the beach were taking pictures of the employees on the terrace using camera phones. Because no other witness corroborated this, I shall not credit this testimony. If this had taken place, someone else would surely have seen it. The Employer’s failure to call any witness to corroborate this
 15 testimony leads me to conclude that it is of dubious reliability.

Only one witness described anything as having occurred during the meeting itself. Alicea testified that, at one point, Molina came into the meeting room and was followed by a man who looked around and then left. Alicea did not know who this man was. Alicea
 20 admitted the man was not wearing any Union insignia. Although he claimed to have seen the same man later, sitting at a table in the lobby as Alicea was leaving the hotel, he could not identify with any certainty that he was with the Union. Because Molina had been talking to officials from the hotel, including members of its security staff, when she was in the hallway,
 25 it is just as likely he was an employee of the hotel as a representative of the Union. Significantly, Molina did not testify to any such incident.

The employee witnesses all described a similar scenario after the meeting ended. The employees were told to remain in the room until their respective terminal was called. They
 30 were then hurried through the lobby to a side entrance where they boarded the busses to leave, one bus at a time. Some of the witnesses testified that they saw people in the hotel, standing or sitting at tables watching them as they were escorted to the busses. Only Alicea testified that they were the same people who had been on the beach before the meeting. The witnesses
 35 testified, with one exception, that none of these people said anything as the employees walked through the hotel. Once outside the hotel, the employees testified consistently to seeing the Union’s tumba coco, the van with the loudspeakers, parked outside the hotel playing loud music. The witnesses also described seeing individuals wearing Union shirts standing outside the hotel, near the tumba coco, or on the side of the roadway as the busses exited. The
 40 employees recognized some of these people as having been with the group on the beach earlier. The number of people identified as being with the Union who were standing outside

¹⁰ Morell, in contrast to the other witnesses, claimed he saw two men standing by a column as the employees went into the dining room and another three men standing outside the meeting room as the employees
 45 went in for the meeting. He claimed these men were looking at the employees “with a little too much interest.” However, he admitted that he did not know who they were and that there was nothing about them that identified them as being with the Union.

¹¹ Correa’s testimony that other employees told her they had been approached by individuals from the group on the beach was rejected as hearsay. It is significant that no other witness reported this happening.

varied from three to six. Most of the witnesses testified that once they were on the bus, they left the hotel without incident.

5 Nieves, Ortiz and Cintron were on the same bus, going to Puerto Nuevo. Nieves testified that, as he was walking to the bus, he saw three women in the lobby with camera phones taking pictures of the employees. Nieves did not recognize the women and has not seen them since this incident. Ortiz testified that he saw a woman near the exit who also appeared to be taking pictures with a camera phone. According to Ortiz, the woman said, as she took pictures, "look, look at their faces and see who they are." Ortiz did not know who she was and did not identify her as being associated with the Union. Cintron, who would have been walking to the bus at about the same time, did not describe seeing anything like this or hearing any similar comments. None of the other employees described seeing anyone taking pictures as they walked through the hotel on the way to their respective busses.

15 Nieves also testified, without any corroboration, that one of the people from the Union who was standing outside tried to get on the bus but the driver would not open the door. Nieves testified further that this same individual walked along the side of the bus and appeared to be writing something down. According to Nieves, when he saw this, he exclaimed "they're writing down our license plate number. They're going to follow us." Ortiz and Cintron, who were on the same bus, did not describe anything like this. Cintron did testify about something else that happened while she was on the bus. According to Cintron, she heard a "knocking" on the back of the bus as it was backing out of the driveway. She did not look to see what caused the knocking noise and admitted that she did not see anyone hit the bus. Again, neither Nieves nor Ortiz, who were on the same bus, described such an event.

30 Perez, the Union's organizer, admitted that she was at the hotel that day with other Union representatives. According to Perez, she received a call that day from some of the Employer's employees who expressed concern about being told to get on a bus to go to a meeting without being told where they were going, what the meeting was about, or how long they would be there. When the employees learned where the meeting was to be held, they asked Perez to establish a union presence there "to reassure the employees". Two employees who testified as witnesses for the Union, Orlando Betancourt and Melvin Soto, corroborated Perez in this regard.

40 Perez testified that she instructed others to go to the Marriott with the tumba coco. Perez arrived at the hotel with her daughter and her daughter's male friend around 3:30-4:00 pm. Pedro Gonzalez, who worked with her on the campaign, was already there with the van. Perez testified that the Union's secretary-treasurer, Herman Vazquez, the Union's Vice President, Jose Rivera, and Jose Budet, a Union business representative, were also at the hotel. When she first saw them, they were eating on the hotel's terrace. According to Perez, she remained at the hotel, either in the lobby, near the bar area, or outside by the tumba coco, until the employees left in the busses. She talked on her cell-phone at times. She did not talk to any of the employer's employees or otherwise interfere with the Employer's activities while there.

Betancourt and Soto attended the meeting at the hotel at the direction of the Employer. Betancourt was permitted to drive to the meeting on his own because he told his manager that he had business to take care of with his wife later. Soto rode on the bus from the Arecibo terminal. Both men testified that they were on the terrace before the meeting but did not see anything. Soto did see a young man under a palm tree but claimed not to have seen anyone he recognized as being from the Union. Soto testified that there was a rumor going around among the employees before the meeting that “union people” were around. On cross-examination, Soto acknowledged that he saw three people wearing union clothing on the beach looking toward the terrace where the Employer’s employees were gathered.

Bettancourt testified that, after the meeting, the security people would not let him leave the hotel to go to his car so he had to wait. He did see Perez and others from the Union and greeted them. Bettancourt did not see anyone from the Union threaten anyone or engage in any other intimidating conduct. Soto testified that, as he was being escorted to the bus for the Arecibo terminal, he saw a lot of people in the lobby and hallway but no one impeded his exit. He denied that anyone threatened any of the employees. According to Soto, he got on the bus and left without incident. He recalled seeing the Union’s van playing music and saw three people wearing Union shirts standing outside, but no one did anything to threaten or intimidate the employees.

The Employer filed five separate objections related to the Union’s conduct at the hotel. Objection No. 6 alleges that the Union engaged in objectionable conduct by “standing outside the room where [the meeting] was being held in order to stare at employees who came in or out of [the meeting].” Objection No. 7 alleges that the Union “punch[ed] and hit[]” the busses transporting the employees. Objection No. 8 claims that the Union “point[ed] in an aggressive manner at the employees inside the busses.” Objection No. 9 claims that the Union “shout[ed] intimidating words at the employees inside the busses.” Finally, Objection No. 10 alleges that the Union “photograph[ed] employees as they came in and/or out of [the meeting].”

There is no dispute that Perez and other union officials went to the hotel on April 23. I credit the testimony of Perez, which was corroborated by Bettancourt, that she went to the hotel in response to requests from employees in order to establish a union presence there. Perez also admitted to being in the lobby and outside the hotel, along with other Union officials, at the time the employees were leaving. There is also no dispute that the Union’s van, or “tumba coco”, was at the scene playing loud music, as employees boarded the busses to return to their home terminals. I also find, based on the testimony of the employees who were at the meeting, including the Union’s witness Soto, that several individuals wearing Union tee shirts stood on the beach outside the hotel before the Employer’s meeting, in a position where they could be seen by employees gathered on the terrace. As noted above, I do not credit the testimony of Nieves that these individuals took pictures of the employees. In addition, I attach little weight to the subjective impressions of Correa and Alicea regarding the “attitude” or posture displayed by the group on the beach. It is clear from the testimony of the majority of the witnesses that the people on the beach merely stood and watched.

Although there is some testimony in the record about individuals being inside the hotel before the meeting and that, at one point, an unidentified man briefly entered the room where the meeting was held, there is no evidence to tie these individuals to the Union. After all, the location of the meeting was a public hotel. By Molina's own account, there were a number of people not associated with the Union, i.e. police officers, security people and managers from the hotel, in the hallway outside the meeting room. In addition, there were in all probability tourists and other visitors to the hotel who may have been curious about the activities going on at the time, particularly after someone summoned police to the hotel. There simply is not enough evidence to establish that these strangers had anything to do with the Union or the campaign.

From the testimony of the witnesses, it appears that most of the allegedly objectionable conduct occurred after the meeting, as the employees were being rushed out the door and onto the busses to be brought home. I note initially that the apparently chaotic atmosphere at the time was caused not by the Union, but by the reaction of the hotel's management and the Employer to the mere presence of the union. There is no evidence that the group on the beach caused any disturbance, nor is there any evidence that individuals from this group, or anyone else associated with the Union, did anything that would have warranted a police response. Yet, if Molina is to be believed, someone called the police. The disturbance outside the meeting, if there was one, had to be the interaction of the police with Molina and the hotel's management and security people since there is no evidence anyone from the Union was in the hallway doing anything of note during the time the meeting was taking place.

Most of the employees who testified did not describe anyone from the Union doing anything as they walked to the bus. Only two witnesses, Nieves and Ortiz, claimed to have seen anyone taking pictures. Only Ortiz claimed to have heard one of those taking pictures say something about the employees. Only one employee, Cintron, heard what sounded like a "knock" on the back of the bus, and only one employee, Nieves again, claimed that someone from the Union tried to board the bus. I find the testimony of these witnesses either incredible or unreliable as a basis for overturning the results of the election.

Based on the above, I find that the Employer has offered no credible evidence to support the allegations contained in Objections 7, 8 and 9. Accordingly, I shall recommend that these objections be overruled. With respect to Objection No. 10, although two employees claimed to have seen one or two women apparently taking pictures with camera phones of the employees leaving the meeting, there is no evidence in the record to link these women to the Union. Accordingly, I shall recommend that Objection 10 be overruled.

The only remaining objection, Objection No. 6, essentially claims that the Union engaged in surveillance of the Employer's meeting and that such conduct would reasonably lead employees to fear adverse consequences if they supported the Employer in the election. As noted above, I have found sufficient evidence to establish that Union agents and others associated with the Union were present and observed the employees who were at the hotel to attend the Employer's meeting. The issue is whether this, without more, warrants setting

aside the election.

The standard used by the Board to evaluate conduct engaged in by a party is an objective one, i.e. whether it has the tendency to interfere with employees' freedom of choice and could have affected the outcome of the election. *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995). The Board considers a number of factors to determine whether a party has engaged in conduct warranting a new election, including (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among unit employees; (3) the number of unit employees subjected to the alleged misconduct; (4) the proximity of the alleged misconduct to the election; (5) the degree to which the alleged misconduct persists in the minds of unit employees; (6) the extent of dissemination of the alleged misconduct among unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the alleged misconduct can be attributed to the party. *Taylor Wharton Division*, 336 NLRB 157, 158 (2001); *Avis Rent-a-Car System, Inc.*, *supra*.

Here, the credible evidence establishes that Perez and the other Union representatives who were at the hotel engaged in no conduct that would be objectively coercive or threatening toward the employees gathered there for the Employer's meeting. The Employer argues that the type of "surveillance" engaged in by the Union, if engaged in by an employer would be found objectionable and that the Board should apply the same standard to all parties to an election. The Board, in *Randell Warehouse of Arizona*, *supra*, has already considered and rejected such an argument, noting that "the Board and the courts ... have long applied differing standards to certain types of employer and union conduct during election campaigns in recognition of the fundamental fact that an employer, unlike a union, has virtually absolute control over employees' terms and conditions of employment." *Id.* at 1037. Although the Board in that case addressed the issue of union photographing employees during union handbilling, the Board's rationale for distinguishing such conduct engaged in by unions and employers applies equally to the conduct at issue here.

In an attempt to cast the Union's conduct here in an ominous light, the Employer cites the Union's "history of violence", as documented in several prior Board decisions.¹² However, all of the conduct described in these prior cases occurred more than 30 years ago. There is no evidence that Perez or any of the other Union officials who were at the hotel participated in the conduct at issue in these old cases. Nor is there any evidence in the record of current violent conduct on the part of the Union. In the absence of such evidence, that might give context to the Union's conduct at the hotel, I am unprepared to find the mere presence of the Union sufficiently egregious to warrant overturning the result of the election.

Accordingly, based on the above, I shall recommend that Objection No. 6 be overruled.

¹² *Union de Tronquistas, Local 901 (F.F. Instrument Corporation)*, 210 NLRB 1040 (1974); *Union de Tronquistas, Local 901 (Lock Joint Pipe & Co. of Puerto Rico)*, 202 NLRB 399 (1973); *Union de Tronquistas, Local 901 (Hotel LaConcha)*, 193 NLRB 591, 598 (1971) and cases cited therein.

CONCLUSION

Based on the above, and the record as a whole, I recommend that the Employer's
Objections to the Election in the above matter be overruled and that the case be remanded to
the Regional Director for Region 24 to issue a certification of representative designating the
Petitioner as the collective-bargaining representative of employees in the appropriate unit.¹³

Dated, Washington, D.C.

William N. Cates
Associate Chief Judge

¹³ Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, any party may file with the Board in Washington, D.C., within fourteen (14) days from issuance of this report, an original and eight (8) copies of exceptions to this report. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director of Region 24. If no timely exceptions are filed, the Board will adopt the recommendations set forth in this report.